TS SAMBANTHAMURTI

v.

ANTHONY J DASON & ORS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-403-1995]
14 JANUARY 1999

CONTRACT: *Sale and purchase of land - Fraud - Whether agreement tainted with fraud - Whether vendor's consent to sell land obtained by fraud of defendants - Fiduciary duty - Whether defendants owed any fiduciary duty to plaintiff*

The plaintiff sold a piece of land ('the land') to the 5th defendant for RM2.8 million through the assistance of the defendants. Upon executing the sale and purchase agreement, the 5th defendant paid a deposit of RM265,000 and undertook to pay the balance price upon the plaintiff obtaining the approval for the conversion and sub-division of the land. The approval was not obtained within the stipulated time, and that being so, the 1st and 4th defendants proposed that the plaintiff sell the land to a third party for RM3.3 million. With the said proposal in mind, the plaintiff signed a revocation agreement with the 5th defendant revoking the sale and purchase agreement, and undertook to pay the latter RM100,000.

The plaintiff subsequently claimed that his agreement to sell the land was obtained from him by the fraud of the defendants, as it was not disclosed to him that the 1st defendant was a director of the 5th defendant. The plaintiff also claimed that in executing the sale transaction the 1st, 3rd and 4th defendants had breached their fiduciary duty to him. The plaintiff, in the circumstances, rejected the third party's offer to purchase the land for RM3.3 million, and applied for a declaration that the sale and purchase agreement was invalid and for the RM265,000 deposit to be forfeited.

The defendants counter-claimed with the 3rd defendant claiming a 2% commission for assisting in the sale of the land, the 4th defendant the expenses discharged by him in assisting to obtain the conversion and subdivision for the land and also RM500,000 allegedly paid by him as consideration of the revocation agreement, and the 5th defendant the return of the RM265,000 deposit and another RM400,000 payable to him under the revocation agreement.

The learned judge dismissed the plaintiff's claim ruling that the defendants did not commit any fraud on the plaintiff nor owe any fiduciary duty to him, and that the sale and purchase agreement was valid until its revocation. The learned judge also allowed the counterclaims of the 3rd, 4th and 5th defendants, whereupon the plaintiff appealed.

Held:
Per Abu Mansor JCA

[1] There was no merit in the contention that the sale and purchase agreement was tainted by fraud. It cannot be accepted that it was so material to the appellant who owned the 5th defendant for, if it was a matter that he was so concerned with, it was open to him to conduct a search before he signed the sale and purchase agreement. The learned judge was right in holding that both the sale and purchase agreement and the revocation agreement were valid.

[2] There was no evidence before the learned judge to support the appellant's allegation of the obtaining of any secret profit by the 1st defendant. The appellant, other than mentioning the allegation, failed to produce any evidence to support this allegation.

[3] There was no fiduciary duty on the part of the 3rd and 4th defendants to reveal matters pertaining to the property and the sale and purchase agreement, or to act for the benefit and interest of the plaintiff. The 3rd defendant's duty was to find a purchaser and the 4th defendant was to assist the plaintiff in obtaining the necessary approval from the relevant authorities. They owe no fiduciary duty to the appellant. This being the case, the appeal in respect of the appellant's statement of claim against all defendants is dismissed.

[4] As to the appellant's appeal against the 5th defendant in the counterclaim, the appeal is allowed to the extent of setting aside paras (1)(B)(a) and (1)(B)(c) of the learned judge's order and confirming para (1)(B)(c) thereof.

[5] In order that the 4th defendant may successfully claim the expenses there must be documents to prove same. Since there are no such documents, and no proof that the 4th defendant had been duly appointed as agent of the third defendant, appellant's appeal agaisnt the 4th defendant is allowed and the learned trial judge's order in para (1)(B)(c), in so far as it concerned the 4th defendant, is set aside.

[6] The appeal against the 3rd defendant is dismissed. The judge's order in para (1)(B)(c) in respect of the 3rd defendant is set aside and substituted with judgment for the 3rd defendant for RM56,000.

[7] The appeal in civil suit 258/1985 (consolidated with present appeal) is partially allowed by the judgment sum being reduced by RM20,000.

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif menjual sekeping tanah ('tanah') kepada defendan kelima dengan harga RM 2.8 juta dengan bantuan defendan-defendan. Selepas perjanjian jual beli dimeterai, defendan kelima membayar deposit sebanyak 265,000 dan berjanji untuk membayar baki harga apabila kelulusan tukar syarat dan pecah lot diperolehi plaintif. Kelulusan tidak diperolehi dalam masa yang ditetapkan, dan dengan itu, defendan pertama dan keempat mencadangkan supaya tanah dijual kepada pihak ketiga dengan harga RM3.3 juta. Dengan pertimbangan cadangan tersebut, plaintif menandatangani perjanjian revokasi dengan defendan dan membatalkan perjanjian jual beli sambi berjanji untuk membayar RM100,000 kepada defendan kelima.

Plaintif kemudiannya mengatakan bahawa persetujuan beliau untuk menjual tanah telah diperolehi oleh defendan-defendan dengan secara fraud, disebabkan kegagalan mereka mengisytiharkan bahawa defendan pertama adalah juga seorang pengarah defendan kelima. Plaintif juga mengatakan bahawa dalam memeterai transaksi jual beli defendan pertama, kedua, ketiga dan keempat telah melanggar tanggungjawab fidusiari mereka terhadapnya. Plaintif, dengan itu, menolak tawaran pihak ketiga untuk membeli tanah pada harga RM3.3 juta, dan seterusnya memohon deklarasi bahawa perjanjian jual beli adalah tak sah dan bahawa beliau berhak kepada wang deposit sebanyak RM2654,000 tersebut.

Defendan-defendan menuntut balas dengan defendan ketiga menuntut komisyen 2% kerana membantu dalam penjualan tanah, defendan keempat menuntut belanja yang dikeluarkannya kerana cuba mendapatkan tukar syarat dan pecah lot tanah serta RM500,000 yang dikata dibayar olehnya sebagai balasan kepada perjanjian revokasi, dan defendan kelima menuntut pengembalian deposit RM265,000 dan juga RM400,000 yang harus dibayar kepadanya di bawah perjanjian revokasi. Hakim bijaksana menolak rayuan plaintif dengan memutuskan bahawa defendan-defendan tidak melakukan apa-apa fraud dan tidak mempunyai hubungan fidusiari dengan plaintif, dan bahawa perjanjian jual beli adalah sah sehingga ianya dibatalkan. Hakim bijaksana juga membenarkan tuntutan balas defendan ketiga, keempat dan kelima, ekoran mana plaintif telah merayu.

Diputuskan:
Oleh Abu Mansor HMR

[1] Tiada merit dalam hujah bahawa perjanjian jual beli dikotori oleh fraud. Adalah tidak boleh diterima bahawa ianya sangat material kepada plaintif tentang siapa yang memiliki defendan kelima, kerana, jika itu menjadi perkara yang penting baginya, adalah terbuka baginya untuk melakukan carian sebelum menandatangai perjanjian jual beli. Hakim bijaksana adalah betul dalam merumuskan bahawa kedua-dua perjanjian jual beli dan perjanjian revokasi adalah sah.

[2] Tiada keterangan di hadapan hakim bijaksana untuk menyokong tohmahan perayu bahawa defendan pertama telah memperolehi apa-apa keuntungan sulit. Perayu, selain dari berkata sedemikian, gagal menunjukkan apa-apa bukti bagi menyokong pengataannya.

[3] Tiada tanggungan fidusiari atas defendan ketiga dan keempat untuk mendedahkan perkara-perkara berkaitan hartanah dan perjanjian jual beli ataupun untuk bertindak demi kemunafaatan dan kebajikan plaintif. Tanggungjawab defendan ketiga adalah untuk mencari pembeli dan defendan keempat bertanggungjawab untuk membantu plaintif mendapat kelulusan yang diperlukan dari autoriti-autoriti yang relevan. Mereka tidak mempunyai apa-apa tanggungjawab fidusiari terhadap plaintif. Dengan keadaan ini, rayuan yang berkait dengan Penyata Tuntutan plaintif adalah ditolak.

[4] Berhubung rayuan perayu terhadap defendan kelima di dalam tuntutan balas, rayuan dibenarkan sebahagiannya, dengan mengenepikan peranggan-perenggan (1)(B)(a) dan (1)(B)(c) perintah hakim bijaksana dan mengesahkan perenggan (1)(B)(b) nya.

[5] Untuk berjaya dalam tuntutan perbelanjaannya, defendan keempat mestilah membuktikan dengan dokumen. Oleh kerana dokumen sedemikian tidak ada, dan tidak terdapat bukti bahawa defendan keempat telah dilantik sebagai ejen defendan ketiga, maka rayuan perayu terhadap defendan keempat dibenarkan dan perintah hakim bijaksana di dalam perenggan (1)(B)(c) setakat mana ianya berkaitan dengan defendan keempat diketepikan.

[6] Rayuan terhadap defendan ketiga ditolak. Perintah hakim bijaksana dalam perenggan (1)(B)(c) berkaitan defendan ketiga diketepikan dan diganti dengan penghakiman untuk defendan ketiga sebanyak RM56,000.

[7] Rayuan di dalam kes sivil 258/1985 (dicantum dengan rayuan semasa) dibenarkan sebahagiannya dengan jumlah penghakiman dikurangkan sebanyak RM20,000.

[Perintah sekadarnya.]

For the appellant - Amizaizul Izral; M/s Bhag Sulaiman & Co
For the 1st & 5th respondents - Porres P Royan (T Sudhar with him); M/s Shook Lin & Bok
For the 2nd respondent - Ebenezer Ramesh; M/s Dason & Co
For the 3rd & 4th respondents - James Selva; M/s Ong Kok Bin & Co

Reported by WA Sharif

JUDGMENT

Abu Mansor Ali JCA:

The facts of the case are as follows. The appellant/plaintiff was the registered owner of a piece of land in Kulim, Kedah. The plaintiff was informed by the respondent/4th defendant that his land was valued at RM2.8 million and that the respondent/5th defendant had agreed to purchase plaintiff's land.

The plaintiff entered into a sale and purchase agreement with the 5th defendant. Pursuant to the agreement, the 5th defendant paid and the plaintiff acknowledged receipt of deposit amounting to RM265,000. The balance of the purchase price was to be paid when the plaintiff had obtained approval for conversion and subdivision of the said land within five months from the date of the agreement.

When the plaintiff failed to obtain the said approval, the 1st defendant and the 4th defendant proposed to sell the said land to a 3rd party for the sum of RM3.3 million. The plaintiff and the 5th defendant signed a revocation agreement and the plaintiff was required to pay RM100,000 to the 5th defendant.

Plaintiff claimed that the sale and purchase agreement was revocable at his option because his agreement to sell the land, according to him, was obtained from him by the fraud of 1st, 2nd, 3rd and 4th defendants.

The plaintiff claimed a declaration in the High Court that the said agreement was invalid and of no effect and that the deposit amounting to RM265,000 paid to the plaintiff be forfeited and that the defendants return the title of the said land and order that the Pentadbir Tanah Kulim cancel the caveat entered in respect of the said land by the 5th defendant and an injunction preventing the defendants from dealing with the said land and also a claim for damages.

The defendants/respondents on the other hand, counterclaimed. The 3rd defendant counter-claimed an amount of RM56,000 being an agreed commission for finding the 5th defendant as purchaser of the said land while the 4th defendant counter-claimed in damages for the breach of the option agreement dated 1 April 1982 by the plaintiff and expenses arising therefrom and lastly the 5th defendant counterclaimed for the return of RM265,000 and also RM400,000 under the revocation agreement and damages.

The learned trial judge dismissed the claim of the plaintiff awarding costs against him and allowing all the counterclaims of the 3rd defendant, 4th defendant and the 5th defendant. The plaintiff was ordered to pay damages to the 3rd defendant, 4th defendant and 5th defendant.

The plaintiff being dissatisfied with the decision of the learned trial judge appeals to this court (the main appeal).

Before us the appellant put forward several grounds of appeal but he proceeded on only a few.

The first issue was whether the learned trial judge was correct in her judgment that the plaintiff had been unable to prove fraud.

At p. 9 of her grounds of judgment, after referring to several authorities on fraud, she said:

> It is also trite law that he who alleges fraud must clearly and distinctly prove it. The burden does not shift to the defendants or any of them to prove that they did engage in fraudulent or other wrongful activity against the plaintiff.

By the authorities cited by the learned trial judge, it was clear to us she was aware and did apply the correct authorities on fraud and the degree of proof required of the appellant.

The appellant contended that fraud was committed against him because, it was not disclosed to him that the 1st defendant was a director of 5th defendant and 4th defendant and Tan Sri A Tharmalingam who owned the 5th defendant failed to disclose this fact to him. The trial judge said that fraud had not been proved and she held that the sale and purchase agreement remained valid until its revocation.

We find the contention of the appellant that the sale and purchase agreement was tainted by fraud lacked merit. We cannot accept that it was so material and relevant to the appellant who owned the 5th defendant for if it was a matter that he was so concerned it was open to him to conduct a search and it would have been duly revealed who the directors were before he signed

the sale and purchase agreement. We agree with the finding and reasoning of the learned trial judge that both the sale and purchase agreement and the revocation agreement were valid.

Apart from the ground of fraud, the appellant also advanced another ground which was that the 1st, 3rd and 4th defendants are guilty of breach of fiduciary duty. The appellant alleges that the 1st defendant had breached his statutory duty when, as appellant's solicitor, he acted fraudulently to obtain a "secret profit" in the sum of RM500,000.

It is clear to us that the learned trial judge did not find any evidence to support the appellant's allegation of the obtaining of any secret profit by the 1st defendant. The appellant, other than mentioning the allegation in his argument, failed to produce any evidence to support this allegation.

Then as regards the alleged breach of fiduciary duty by the 3rd defendant and 4th defendant, the learned trial judge at p. 13 of her judgment said:

> I am also of the view that there is no fiduciary duty on the part of the 3rd and 4th defendants to reveal matters pertaining to the property, Sale and Purchase Agreement and also to act for the benefit and interest of the plaintiff.

Third defendant's duty was only to find a purchaser and the fourth defendant was to assist the plaintiff in obtaining the necessary approval from the relevant authorities. We agree with the learned trial judge that they owe no fiduciary duty to the appellant.

In the course of argument, Mr. Porres Royan for the 1st and 5th defendants contended that the appellant had breached the revocation agreement by his refusal of the offer to purchase the said land by Koperasi Majujaya at the price of RM3.3 million. The learned trial judge in her grounds of judgment at p. 14 dealt with this and she said:

> Thus by rejecting the offer the plaintiff has breached the Revocation Agreement and the fifth defendant is therefore entitled to claim from the plaintiff whatever sum is due under the Agreement, namely sum of RM665,000/- which is as claimed in paragraph 4(1) and (2) of its counterclaim.

As far as the appeal in respect of the appellant's statement of claim against all the respondents is concerned, we dismissed his appeal with costs. As to the appellant's appeal against the 5th defendant in the counterclaim, we allowed the appeal to the extent of setting aside para. (1)(B)(a) of the trial judge's order of 30 May 1995 as at p. 42 of the Record of Appeal Bahagian A. We also set aside para. (l)(B)(c) in so far as the 5th defendant is concerned. We hereby confirm the learned trial judge's order in para. (1)(B)(b) thereof. As for costs in the appellant's appeal against the 5th defendant, the appellant is awarded 2/3 of costs of the appeal.

We now turn to the appellant's appeal against the 3rd and 4th defendants. Mr. James Selva appeared for the 3rd and 4th defendants and responded to this appeal.

He began at the onset by reminding us that the counterclaim of the 3rd defendant was for a 2% commission for assisting in the sale of the said land for RM2.8 million, resulting in the sale and purchase agreement. The commission of 2% was in the sum of RM56,000 with costs and interest.

In the case of the 4th defendant, on the other hand, his counterclaim was for payment of expenses discharged by the 4th defendant in assisting the plaintiff to obtain the conversion, subdivision and separate titles for the land and also for the refund of RM500,000 paid by the 4th defendant as consideration for the option agreement. Mr. James Selva contended that the appointment by the plaintiff of Tharmalingam and Majid Estate agent was based on an oral contract. Although the appointment was oral there is, however, admission by the plaintiff as it appeared in the Record of Appeal Volume B1 at pp. 341-342. At p. 42 of the Record of Appeal, the learned judge's order in para. (1)(B)(c) was that the plaintiff do pay to the 3rd, 4th and 5th defendants (5th defendant having been deleted) damages to be assessed by the Senior Assistant Registrar. Mr. James Selva asked us that the appellant's appeal against the 3rd defendant and 4th defendant duly be dismissed.

On being asked by Dato' NH Chan who chaired the panel to show the evidence of the expenses incurred by the 4th defendant, Mr. James Selva pointed to us the Record of Appeal Volume B1 p. 586 where it was stated that the 4th defendant was acting as agent for the 3rd defendant and he was expecting to be reimbursed as the 4th defendant was out of pocket. He urged us to accept that evidence as the statement was unchallenged by the appellant.

It was our opinion that in order that the 4th defendant may successfully claim the expenses there must be documents to prove same and since there are no documents and since the documents were not available at the trial, we ordered that para. (1)(B)(c) of the trial judge's order of 30 May 1995 in so far as it concerned the 4th defendant be set aside.

The appellant's appeal against the 3rd defendant is dismissed with costs. The judge's order at p. 42 of the Appeal Record is hereby amended to the effect that para. (1)(B)(c) is set aside and substituted therefor with judgment for 3rd defendant for the sum of RM56,000 with the usual interest and costs.

As regards the appellant's appeal against the 4th defendant, this court is not shown satisfactory proof, by appropriate and relevant resolution, that the 4th defendant had been duly appointed. As such the appellant's appeal against the 4th defendant is therefore allowed and the learned trial judge's order in para. (1)(B)(c), in so far as it concerned the 4th defendant, is set aside with costs to the appellant to be taxed.

It is clear to this court that as the revocation agreement is no longer valid and enforceable, the 5th defendant is no longer the current purchaser thereof and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant. It was clearly established to us that the said title was with the 1st defendant for safe-keeping. Mr. Anthony J Dason who attended in person told us the property was originally charged by the appellant to Nesa Cooperative at the time when the sale and purchase agreement was signed. The title was then made available to him when the chargees asked for its return and he eventually took out an interpleader summons and he was then holding the title as a stakeholder. After the revocation agreement was repudiated, the chargee requested for its return. Mr. Dason told the court the title was still with him and he was happy to hand it over to court's custody. This court then ordered that 1st defendant do deposit the title with Senior Assistant Registrar of the court pending the outcome of the appeal by the chargee bank.

We then dealt with the consolidated appeal No. 258 of 1985. In this case the learned trial judge had made a finding that defendant (Sambanthamurthi) had made request for the advanced money and the learned trial judge ordered that the plaintiff, A. Tharmalingam, be reimbursed.

Mr. TS Sambanthamurti submitted that the learned judge erred in her finding. He submitted further that there is no evidence that Mr. Tharmalingam did make payment to the Pemungut Hasil Tanah Kulim, as claimed by him, in the sum of RM50,581. There is also no evidence for the judge's finding in respect of the payment of RM120,000.

Mr. Ebenezer Ramesh for the respondent, A. Tharmalingam in this appeal submitted that there is evidence that the respondent/defendant did pay that sum of RM120,000 to Dason & Co. Then Dason & Co., at the appellant's request, expanded RM100,000 of that above sum for the payment towards the deposit due to the 5th defendant for the revocation agreement in the main appeal. The amount of RM100,000 was even acknowledged by the appellant in the said revocation agreement. In this connection, RM50,581 was advanced by the 3rd defendant to the 4th defendant for his expenses. It was in evidence that 4th defendant made a demand for it to the appellant as evidence at p. 965 in Volume C of the Record of Appeal. The learned judge in her judgment as at p. 20 Volume D Record of Appeal accepted and made that finding. And as regards the payment of RM50,581 at p. 790 Volume B2 the learned judge accepted the respondent's evidence that he paid RM50,581 into the account of Tharmalingam Majid & Co. but he was not issued with any receipt. In Volume C at p. 1180 of the Record of Appeal there even appeared a note by appellant and signed by him noting the fact that the payment of RM50,581 was to the Land Office. Then in DW3's evidence there is evidence supporting the payment of the RM120,000.

When it was put to Mr. Sambanthamurthi by the chairman Dato' NH Chan that there is evidence of payment the appellant contended that the defendant all ganged up against him and no payment of money was ever made to the Kulim Land Office. Although there is no official receipt for the payment of RM120,000, there is a receipt, however, issued by Dason & Co for RM100,000 and the chairman noted that there is a receipt from the Land Office Kulim for the payment of RM50,581.

This court accepted that the RM100,000 and the sum of RM50,581 were in fact paid. It is also common ground that the appellant's application for change of condition and subdivision were duly approved and the further evidence was that all payments must have been made else approval would not have been obtained.

In the result the appeal in civil suit 258/1985 is partially allowed by the judgment sum being reduced by RM20,000. We agree with the judgment of the learned trial judge, in the order she made at p. 42 of the Record of Appeal Volume A that the defendant (appellant in the appeal before us) is only to pay the sum of RM100,000 to the plaintiff (Tharmalingam) as well as the sum of RM50,581 with 8% interest p.a. from the date of judgment to the date of realisation with no order as to costs.